No. 87-319

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DALE ABRAHAMS, DANIEL BRUNO, MARCENE E. EDELMAN, ABRAHAM GENDERSON, GINNY M. GRUNLEY, JOHN M. HART, JOANN M. HOLMES, PHILIP PFATT, JR., LIBBY B. POHORYLES, SHARON H. POHORYLES, LARRY D. ROLLINS, ROCHELLE POULOS, NORMAN SCHAECHTER, MAHENDRA SHAH, EDWARD S. STOLL, LINDA W. SWAN, GARY ABRAHAMS, LEWIS B. COGGAN, STEPHEN L. EDELMAN, CHARLOTTE GENDERSON, KENNETH M. GRUNLEY, A. STEWART HOLMES, STEPHEN G. PARKER, LOUIS POHORYLES, STEVEN E. POHORYLES, JAMES A. POULOS, MONA SCHAECHTER, GEETA SHAH, EDWARD S. STOLL, JANE M. STOLL, CARL WEBER, Objectors.

Petitioners,

vs.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether in determining the fairness of the settlement of a stockholder's derivative action involving substantial factual and legal questions, the District Court accorded objecting stockholders constitutional due process and fulfilled its judicial responsibilities: (a) when it refused to grant objecting stockholders pre-trial discovery and any kind of evidentiary hearing with the right of cross examination; (b) when it summarily approved the settlement without making findings of fact and conclusions of law; and (c) when it failed to write an opinion or any other explanation of the reasons for its approval of the settlement.

2. Whether the United States Court of Appeals for the Third Circuit failed to fulfill its judicial responsibilities and obligations by affirming the de-

termination of the District Court by a judgment order: (a) without writing an opinion or other memorandum explaining its failure to apply to this case, the statutory and other due process standards propounded and applied in other similar cases by the Supreme Court, and the Third Circuit; (b) without writing an opinion or memorandum adjudicating a corporate question of exceptional importance to corporate stockholders and investors, involving corporate democracy and the right of corporate directors, without stockholder approval, to issue dual classification stock which redistributes voting power and takes it away from stockholders for the benefit of a controlling stockholder; and (c) without writing an opinion or memorandum adjudicating a corporate question of exceptional importance to corporate stockholders, involving the valuation of

corporate securities in connection with a recapitalization or exchange of securities, which was part of the settlement of a stockholders derivative action.

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1987

No.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Geeta Shah, Edward S. Stoll, Jane M. Stoll, Carl Weber, Objectors.

Petitioners

v

LOUIS SHULMAN, derivatively on behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC., and CENTRAL JERSEY INDUSTRIES, INC.

Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

Neither the District Court nor the Court of Appeals wrote any opinion or explanation of the reasons for their determination.

Jurisdiction

The judgment order of the United States Court of Appeals for the Third Circuit (Appendix Page A1) was entered on May 27, 1987. A timely petition for rehearing was denied on June 24, 1987 (Appendix Page A3). The jurisdiction of the Supreme Court is invoked under 28 USC Sec. 1254 (1).

The jurisdiction of the United States District Court was based on 28 USC Sec. 1332(a).

The Jurisdiction of the United States Court of Appeals for the Third

Circuit was based on 28 USC Sec. 1291.

STATEMENT PURSUANT TO
SUPREME COURT RULE 21

There were no other parties to the proceeding in the court whose judgment is sought to be reviewed.

Statutes Involved

CONSTITUTION OF THE UNITED STATES OF AMERICA -

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court,and notice of the proposed dismissal or compromise shall

be given to shareholders or members in such manner as the court directs

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the

extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

28 USC SEC 2071

Sec. 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

INTERNAL OPERATING PROCEDURES OF THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT.

IOP CHAPTER 6. JUDGMENT ORDERS

A. Criteria.

A case may be terminated in this court by a judgment order:

1. Panel unanimity.

a. When the panel unanimously determines that a judgment of the district court or a decision of the United States Tax Court or a decision or order of an administrative agency should be affirmed or enforced and that a written opinion would have no precedential or institutional value; and

b. any one or more of the following circumstances is dispositive of a matter submitted for decision:

(1) That a judgment for the district court is based on findings of fact which are not clearly erroneous;

(2) That sufficient evidence supports

a jury verdict.

(3) That substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(4) That no error of law appears;

(5) That the appeal is a civil diversity case under 28 U.S.C. Sec. 1332, the result of which does not turn upon an interpretation of the Federal Rules of Evidence for the United States District Courts and Magistrates;

STATEMENT OF CASE

Objecting stockholders of Central Jersey Industries (CJI), a New Jersey public corporation, owning 40,000 shares of common stock representing an investment of $1,000,000 at market value,[1]

(1) At the time of the submission of this matter to the district court on April 28, 1986 the

petition this court for a writ of certiorari to review an order and judgment of the United States District Court for the District of New Jersey, which summarily approved the settlement of a stockholder's derivative action. The district court denied the objecting stockholders the right to pre trial discovery; did not hold an evidentiary hearing with the right to cross examination; failed to make findings of fact and conclusions of law; and did not write an opinion or any other explanation for its summary approval of the settlement. Upon appeal to the United States Court of Appeals for the Third Circuit, that court affirmed the district court by a judgment order. The Third Circuit did not write any

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shares of CJI were selling on the Philadelphia Stock Exchange for approximately $25 per share. Since the approval of the settlement by the district court the shares have declined in value and are now selling at approximately $14 per share.

opinion or give any reasons for its affirmance.

The jurisdiction of the United States District Court was based upon 28 USC Sec. 1332(a). The jurisdiction of the U.S. Court of Appeals derived from 28 USC Sec. 1291.

STATEMENT OF FACTS

At the times here involved, CJI was a New Jersey corporation whose stock was listed on the Philadelphia Stock Exchange. Triangle Industries, Inc. ("Triangle") was a Delaware corporation, listed on the New York Stock Exchange.

On September 25, 1984 and November 30, 1984, Triangle[(2)] acquired a 22% controlling interest in CJI. Seven months later, on June 3, 1985, Triangle

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(2) Triangle held its interests in CJI directly and through its subsidiary, Rowe Holdings, Inc.; these entities are collectively referred to herein as "Triangle."

caused CJI to purchase from Triangle all of the stock of Triangle's subsidiary, Rowe International, Inc. ("Rowe"). This transaction increased Triangle's voting control of CJI from 22% to 44%.

CJI paid $73.5 million for the Rowe shares. This was 73.5 times Rowe's average two-year earnings before taxes.

At the time of the sale, CJI had a five-person board of directors which was controlled by Triangle.

On or about June 25, 1985, some three weeks after the Rowe transaction, the plaintiff commenced a stockholders derivative action against Triangle.

The essence of the complaint is that the controlled board of CJI, and CJI's controlling stockholder, Triangle, caused CJI to purchase the Rowe shares at a price greatly disproportionate to the value of the assets purchased, thereby causing waste of CJI's assets for the

benefit of Triangle.

On or about November 29, 1985, five months after the derivative action was commenced, the plaintiff agreed to settle the case. At that time, no discovery had taken place. After the settlement was agreed upon, plaintiff proceeded perfunctorily and superficially to take some depositions.

At the time of the settlement, the CJI six-member Board was still dominated by Triangle.

The settlement involved an exchange of securities between CJI and Triangle. Among the securities given by CJI to Triangle were shares and warrants which had features uniquely designed to benefit Triangle, and in particular, 320,000 shares of a newly created class C common stock which had three voting rights per share in contrast to the one vote per share voting rights of the other common

stockholders. This was the only stock ever issued by CJI which provided for three voting rights per share. It was created and issued solely by action of the Triangle controlled Board without stockholder approval. The issuance of this stock gave Triangle 44% voting control and redistributed the voting power of the common stockholders by taking from them 22% of their voting power, and giving it to Triangle.

To justify the original purchase of the Rowe shares by CJI from Triangle, Triangle had employed the investment banking firm of LF Rothschild Unterberg, Towbin ("Rothschild") to make an evaluation of the securities and give an opinion as to the fairness of the transaction. In order to justify the exchange of securities in connection with the settlement, Triangle also selected Rothschild to make a valuation of the securi-

ties and give a fairness opinion. In both instances, Rothschild was in a fundamental conflict of interest with CJI, which resulted from Rothschild's ownership of 5.6% of Triangle's stock, and its business relationship to Triangle. Instead of valuing the securities given by CJI to Triangle on the basis of their actual value to Triangle because of the unique features which made them extremely valuable to Triangle, Rothschild low balled their value by basing its valuation on a so-called value in a theoretical open market.

Pursuant to FRCP 23.1, a notice of settlement was sent to the stockholders of CJI inviting objecting stockholders to appear at the district court for that purpose on April 28, 1986. The petitioners appeared as objectors and requested an adjournment for the purpose of conducting pre hearing discovery in

preparation for an evidentiary hearing. The district judge granted the adjournment, and requested that the petitioners submit papers to show him that they were entitled to pre hearing discovery.

The petitioners submitted the affidavit of an expert which concluded that the settlement would result in a loss of $5.3 million to the minority stockholders of CJI and a gain of $10 million to Triangle, so that CJI was in effect paying Triangle to settle its case against Triangle. The petitioners also submitted a fifty page brief showing the existence not only of important legal issues, but as well, of important factual questions as to the valuation of the securities and the fairness of the settlement, which required an evidentiary hearing and cross examination of Rothschild.

The derivative plaintiff did not submit any supporting papers as to either

the fairness of the original Rowe transaction or of the settlement. He chose to rely on the fairness opinions of Rothschild even though his attorneys had obtained an opinion from an expert retained by him at the outset of the litigation, to the effect that the original purchase of the Rowe shares from Triangle was unfair to CJI and would result in a substantial recovery. When this opinion was accidentally uncovered by one of the petitioners' attorneys, plaintiff's attorneys tried to suppress it by first denying that it existed, and then claiming that it was protected work product. The court finally directed that it be made available to petitioners' counsel.

The document in question was highly critical of the Rowe transaction from the point of view of CJI and concluded in part that "on the surface, it does not

appear that Triangle has dealt fairly with Central Jersey Industries in relation to its less than arms length sale of Rowe."

The district court disregarded the genuine issues of fact and law which existed as to the fairness of the settlement, and the valuation of the shares, and the fairness of the original Rowe transaction, and the illegal issuance of securities in connection with the settlement; denied the petitioners pre trial discovery and an evidentiary hearing; summarily approved the settlement without making findings of fact and conclusions of law; did not write an opinion or give, in any manner, any clue as to his reasons for approving the settlement.

Upon appeal to the Court of Appeals for the third circuit, that court affirmed the summary determination of the district court by a judgment order which

was not accompanied by either an opinion or any memorandum stating its reasons for the affirmance.

Reasons For Granting The Writ

I

Certiorari Should Be Granted Because: The Court of Appeals for the Third Circuit Has So Far Departed From The Accepted and Usual Course of Judicial Proceedings, and Has So Far Sanctioned Such A Departure By The District Court, As To Call For An Exercise of The Supreme Court's Power of Supervision.

In this year of the Constitution, when the recent Iran-Contra congressional hearings have revealed how important to our democratic system is the need to prevent abuses of power by failure to adhere to the rule of law, the petitioners ask this court to exer-

cise its supervisory powers to remedy the abandonment of the rule of law by the Court of Appeals for the third circuit and the district court, the denial of constitutional rights, to the petitioners, and the disregard of the legal principles enunciated by this court and the Third Circuit in similar cases.

1. In Schlensky v Dorsey, 574 F 2d 131,147 (1978), the Third Circuit held that in determining the fairness of a settlement, the factors relevant to a class action apply equally to a derivative suit.

In Girsh v Jepson, 521 F 2d 153 (1975) the Third Circuit, quoting from the Second Circuit case of City of Detroit v Grinnell Corp,495 F 2d 448 (1978), held, at 157, that there are nine basically relevant factors which the district court must consider and weigh in determining the fairness of a

settlement. Thus, the Third Circuit in its previously reported opinions, agrees that fairness of compromise is ipso facto a question of fact. See also Plummer v Chemical Bank, 668 F 2d 654 at 659 (2d Cir 1982).

It is fundamental to American jurisprudence that questions of fact can be judicially determined only after the court has first granted an evidentiary hearing at which cross examination is the basic truth finder.

In Girsh,[3] 521 F 2d 153 (1975), the Third Circuit reversed the district court's approval of a settlement where the district court had denied an objector the opportunity to develop a record by means of cross-examination. The

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(3) The opinion was written by Judge Garth, who was one of the three-judge panel in the case at bar.

court quoted from Greenfield v Villager Industries, 483 F 2d 824 (3d Cir. 1973), which, at 831, held that a class action is a procedure which must comport with constitutional due process, and which, at 833, held that an objector at a hearing of a proposed settlement "is entitled to an opportunity to develop a record in support of his contentions by means of cross-examination and argument to the court." Walsh v Great Atlantic & Pacific Tea Company, 726 F 2d 956 (3d Cir. 1983), indicated, at 965, that due process rights of settlement objectors would be violated if they sought and were denied the opportunity to develop a record by cross-examination.

The denial of an evidentiary hearing to the petitioners was particularly egregious because the settlement was highly unusual, and involved an exchange of securities which had unique provi-

sions designed to make them extremely valuable to Triangle.

Fair market value is a question of fact requiring a determination of the value in the hands of the particular recipient and not the value "in a theoretical open market." Affiliated Ute Citizens of Utah v United States, 406 U.S. 128, 155 (1972); Seigal v Merrick, 441 F Supp 587, 590 (S.D.N.Y. 1977), appeal dismissed, 590 F 2d 35 (2d Cir. 1978); 65 Geo. L.J. 1093, 1100.

In the case at bar, the petitioners were denied the opportunity to show by cross examination and testimony, that Rothschild's valuation of the securities was incorrectly low because it was based on the value in a theoretical open market rather than the actual value to Triangle.

Neither the Third Circuit nor the district court explained on what basis

the petitioners were denied an evidentiary hearing and the right of cross examination, and why they did not apply the aforementioned principles to the case at bar.

2. In Schlensky v Dorsey, 574 F 2d 131, 147 (1978) the Third Circuit held that:

> The principal factor to be considered in determining the fairness of a settlement concluding a shareholders' derivative action is the extent of the benefit to be derived from the proposed settlement by the corporation, the real party in interest. In re Pittsburgh & LER Co, 543 F 2d 1058, 1068 (3d Cir., 1976).

To say the least, the affidavit of the petitioners' expert created a clear issue of fact requiring an evidentiary hearing at which both petitioners' expert and Rothschild would testify and be cross examined for the purpose of ascertaining whose securities valuations were correct. According to Schlensky, if pe-

tioners' expert were proved to be correct, the district court would have had to disapprove the settlement on this basis alone. For the settlement would be wholly without benefit to CJI. See also Seigal Merrick, 441 F Supp 587 (SDNY, 1977) appeal dismissed 590 F 2d 35 (2d Cir., 1978), where the court held that if a derivative action settlement involves an exchange of securities and, after an evidentiary hearing on the valuation of the securities, the court finds that the derivative corporation is giving more in value than it is gaining, the court must disapprove the settlement on this basis alone. See also In re Pittsburgh & Lake Erie RR Co. Sec. & Antitrust Lit, 543 F 2d 1058, 1068-70 (3rd Cir., 1976).

Neither the circuit court nor the district court explained what principle of law gave the district court the

right to disregard the above Schlensky principle, in view of the affidavit of petitioners' expert.

3. Schlensky, supra, and Grunin v. House of Pancakes, 513 F 2d 114, 124 (3d Cir., 1975) also stand for the proposition that the principal factor to be considered in determining the fairness of a settlement, is the adequacy of what is being received in settlement in light of the best possible recovery if the derivative action is not settled.

The district court could not have fulfilled this balancing requirement, because the record is barren of any evidence concerning the potentials of recovery in the underlying derivative action. But the record does contain the report of the expert hired by the plaintiff, which plaintiff's attorneys sought to hide, because it indicated that the derivative action would result

in a substantial recovery if the case went to trial.

To say the least, this report created an issue of fact as to the best possible recovery, and neither the third circuit nor the district court explained what rule of law gave them the right to disregard this issue by denying an evidentiary hearing with respect thereto.

4. Fed R Civ P. 52 (a) provides in pertinent part:

> In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon...

The Third Circuit has held as follows in decisions prior to the case at bar: the requirement that the hearing judge shall make findings of fact and conclusions of law, is mandatory. H. Prang Trucking Co. v Local Union No. 469, 613 F 2d 1235, 1238 (1980);

this requirement is so stringent that it cannot be waived by the parties. Berguido v Eastern Air Lines Inc., 369 F 2d 874, 877 (1966, cert den 391 US 966); the purpose of the requirement is to aid the trier of the facts in the process of adjuication, and to evoke care on the part of the trier of the facts in considering and adjudicating the facts. Roberts v Ross, 344 F 2d 747, 751-752 (1965); to aid the litigants and the appellate court by affording them a clear understanding of the ground or basis of the decision. Roberts v Ross, 344 F 2d 747 (1965); Berguido, supra, 369 F 2d at 877. See also Taylor v McKeithen, 407 US 191 (1972), where the Court of Appeals had reversed the district court without opinion and this court granted certiorari and reversed the Court of Appeals because this court did not have the benefit of the insight

of the Court of Appeals.

The making of findings of fact and conclusions of law is deemed so vital to the judicial process that, not only must they be supported by a proper evaluation of the facts and law, but as well, they must be based upon a competent evidentiary foundation. In Protective Committee v Anderson, 390 US 414 (1969) this court held at 434, that even where the district court has made findings and conclusions, "mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" is not enough, and at 437, that when a district court approves a settlement which is not based upon "well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors," its decision will not survive appellate review. In Girsh v Jepson 521 F 2d 153 (1975), the Third

Circuit reversed the district court's approval of the settlement and held that even though the district court, in approving the settlement, referred to the nine relevant factors which the district court must consider and weigh in determining the fairness of a settlement, it nevertheless failed to live up to its responsibility as the guardian of the rights of absentee class members, because it predicated its approval on a record which was inadequate because the objector had been denied both the right to compel answers to interrogatories and the right to participate effectively in the settlement hearing through cross examination.

In Roberts v Ross, 344 F 2d 747 (1965) and Schlensky v Dorsey 574 F 2d 131, 148 (1978) the Third Circuit vacated the district court's judgment and remanded the case to the district court

because the findings and conclusions did not adequately afford the Third Circuit any indication of the legal standard under which the evidence was considered. See also the following cases cited in Plummer v Chemical Bank, 668 F 2d 654, 659 (2d Cir., 1982), which held that the district court must make findings of fact and conclusions of law whenever the propriety of a settlement is in dispute: Cotton v Hinton, 559 F 2d 1326, 1331 (5th Cir., 1977); Mandujano v Basic Vegetable Products Inc., 541 F 2d 832,834-36 (9th Cir., 1976); Patterson v Newspaper and Mail Deliverers' Union, 384 F Supp 585, 588 (SDNY 1974) affd 514 F 2d 767 (2d Cir., 1975) cert den 427 US 911 (1976).

In the case at bar, the district judge did not make findings of fact and conclusions of law as he was required to by Rule 52(a). Considering the purposes

of Rule 52(a) as stated by the Third Circuit, the conclusion is inescapable that the district court did not consider and weigh the nine relevant factors which, according to Girsh, he was required to consider and weigh before he could be in a position to rule on the fairness of the settlement. Nor was he in a position to consider and weigh these factors. Because of his denial of an evidentiary hearing to the petitioners, he did not have an adequate record with competent evidence with respect to which he could apply the appropriate legal standards. All he had was a voluminous mountain of papers which were quantitative but wholly devoid of legal quality and competency, because he prevented their factual truths from being tested by cross examination in the time proven procedure of American constitutional jurisprudence. The conclusion

is inevitable that he succumbed to "the easy temptation or tendency to ill considered or even arbitrary action." NLRB v Amalgamated Clothing Workers of America, 430 F 2d 966, 972 (5th Cir., 1970).

In the circumstances, the Third Circuit was required by the determination of this court in Protective Committee and Taylor, and by the determinations of the Third Circuit in Roberts and Schlensky to vacate the district court's judgment. By disregarding these well established principles, the Third Circuit acted in an arbitrary manner and abandoned the rule of law.

5. In Grunin v International House of Pancakes, 513 F 2d 114, 123 (1974), the Third Circuit held that a settlement cannot be approved if it provides for a violation of law.

The issuance of the 320,000 newly created three vote per share common

stock by Board action without stockholder approval, redistributed the voting power of the common stockholders, took away from them 22% of their voting power, and gave it to Triangle.

In all the cases which petitioners have been able to find on the subject, it has been held, based upon the reasoning in the landmark case of Asarco v M.R.H. Holmes A. Court, 611 F Supp 468 (D.N.J. 1985), that equality of voting power among stockholders of the same class is a basic concept of New Jersey corporate law, and that neither N.J.S.A. 14A:7-2 nor any other provision of New Jersey corporate law confers upon the directors of a corporation the power to issue classes of shares which have differing voting rights within the same class, or which would redistribute voting power within a class. Asarco, 611 F Supp at 477; Amalgamated Sugar Co. v NL In-

dustries, Inc., 644 F Supp 1229, 1234 (SDNY 1986); Minstar Acquiring Corp. v AMF, 621 F Supp 1252, 1258 (SDNY 1985).

In the case at bar, just prior to the settlement exchange, controlling stockholder Triangle owned 340,439 shares of one vote common stock which represented 22% of the voting power of the common shares. By the exchange, the CJI board effectively took these 340,439 one vote shares, and converted them into 320,000 three vote common shares which represented 44% of the common share voting power. This is the very evil described in Asarco of a situation in which "corporate control would be manipulated by readjustment of intra-class voting rights," and constituting an "abuse of this power and the radical departure from traditional corporate practice which it represents," that leads to the conclusion "that New

Jersey courts would not read this power into the statute." Asarco, 611 F Supp at 478-79

Respondents' argument that the creation and issuance of the 320,000 three vote common shares did not violate N.J. S.A. 14A:702 because, prior to the issuance of the shares, Triangle had 44% of CJI's voting control and subsequent thereto it wound up with the same 44% voting control, emphasizes that Asarco principles were violated. The 44% voting control held by Triangle prior to the issuance of the three vote common shares, was held by means of 340,439 shares of one vote common stock to the extent of 22%, and another 625,000 one vote preferred shares to the extent of the additional 22%. By creating and issuing the 320,000 three vote common shares, the board took 22% of the voting power of the common shareholders and

transferred it to Triangle, thereby giving Triangle 44% voting control through the medium of 320,000 three vote common shares instead of through the medium of 340,439 one vote common shares and 625,000 one vote preferred shares.

The question of the illegality of the issuance of the 320,000 shares of three vote dual classification common stock, is one of exceptional importance to the bar, the investing public and investment bankers. For some period of time, the national securities exchanges and associations have been in dispute as to whether to refuse the listing of stock of corporations which issue dual classification shares. Because they could not agree on self regulation, the Securities and Exchange Commission has decided to intervene and proposed an amendment of Rule 19c-4

which would endorse a one share one vote concept and in effect make it illegal to issue dual classification shares. See CCH Fed Sec L Rep, number 1237,June 24, 1987, part II, One Share One Vote Proposed Disenfranchisement Rule - SEC Proposals ; National Law Journal, July 6, 1987, P 37 Is A 'One Share, One Vote' Rule a Good Idea ; Office of the Chief Economist Securities and Exchange Commission, July 16, 1987, Update-- The Effects of Dual-Class Recapitalizations on Shareholder Wealth: Including Evidence From 1986-1987 ; Dual Class Recapitalization and Shareholder Voting Rights, 87 Colum L Rev 106 (1987).

Despite the importance of this issue the district court approved the settlement by judgment order without explaining the relationship of Grunin and this issue, to its determination.

We can only surmise that the Third

Circuit affirmed by judgment order on the authority of its Internal Operating Procedures (IOP). If so, the Third Circuit disregarded the plain meaning of IOP.

The only provisions of its IOP upon which the Third Circuit could conceivably have relied, are ch 6 A 1 (a) and b (1), (4) or (5), which permit a judgment order only where: a written opinion would have no precedential value (ch 6 A 1 a) and either the judgment of the district court is based upon findings of fact (ch 6 A 1 b (1)), or no error of law appears (ch 6 A 1 b (4)), or the appeal is a civil diversity case, the result of which does not turn upon an interpretation of the Federal Rules of Civil Procedure (ch 6 A 1 b (5)).

In this case the district court did not make findings of fact or conclusions of law. The existing precedents of this

court and of the Third Circuit reveal that the district court committed substantial errors of law. The result in the case at bar turned upon whether FRCP 23.1 and constitutional due process, required the district court to grant the petitioners pre trial discovery and an evidentiary hearing with the right of cross examination, and whether FRCP 52 (a) required the district court to make findings of fact and conclusions of law. Hence the Third Circuit could not justify the use of a judgment order pursuant to sub (1) (4) or (5). Further, the important nature of the legal issues involved, and the conflict between the determination in this case and the existing precedents of this court and the Third Circuit, reveal that a written opinion would not only have had precedential value, but was an absolute necessity if the Third Circuit was to square its

determination with its existing precedents, and show that its determination was based on rule of law.

The Third Circuit disregarded the plain meaning of its IOP and utilized its IOP for the purpose of making an arbitrary determination which had the effect of abdicating the rule of law and concealing the violation of the petitioners' due process rights and the disregard of the principles enunciated by this court and the Third Circuit in similar cases. This case calls for the exercise by this court of its supervisory powers.

6. Congress has provided in 28 USC Sec 2071, that circuit courts may prescribe rules for the conduct of their own business. The great increase in the amount of judicial business in the circuit courts has caused them to adopt local rules governing whether, how, and in

what circumstances they may dispense with the writing of opinions by making summary orders.

The counterpart of this type of local rule in the Third Circuit is its Internal Operating Procedures (IOP) ch 6, which provides for the making of "judgment orders."

In US v Baynes, 548 F 2d 481 (1977), the Third Circuit held that its judgment order unaccompanied by an opinion, did not constitute a denial of constitutional due process because: the judgment of the district court was based on findings of fact which were not clearly erroneous; sufficient evidence justified the jury verdict; and the appeal did not require a new interpretation of a federal statute or rule or a new interpretation of a rule of constitutional law or of new rules of practice or procedure. In its opinion justifying its

IOP, and its failure to write an opinion, the Third Circuit cited with approval the Fifth Circuit case of NLRB v Amalgamated Clothing Workers of America, 430 F 2d 966,971-972 (5th Cir., 1970), where the Fifth Circuit wrote an opinion in justification of its Rule 21, its counterpart of the Third Circuit's IOP ch 6.

In NLRB, the Fifth Circuit pointed out that the ever growing increase in the amount of its business, required it to "exercise imaginative inventive resourcefulness in fashioning new methods or modifying older ones to enable us to at least stay abreast of this flood tide". 430 F 2d at 970. However, the court said, the rule must be "sparingly used," must never be applied "to avoid making a difficult or problemsome decision or to conceal divisive or disturbing issues," and must be used only by a

vigilant court "sensitive now to the factors which would make application of the Rule wrong or unwise or inappropriate." 430 F 2d 972-973.

In referring to the writing of opinions, the court pointed out that a "heavy obligation" of decisive significance is placed upon the court in the determination of whether "an opinion would have no precedential value." While this this means that the court "must determine in each case whether the outcome under review meets acceptable legal standards," the court must also bear in mind that "a most important function is the writing of opinions," which "serve a number of purposes," the two most significant of which are (1) that "an articulated discussion of the factors, legal, factual,or both, which lead the court to one rather than to another result, gives strength to the system and

reduces, if not eliminates, the easy temptation or tendency to ill considered or even arbitrary action by those having the awesome power of almost final review," and (2) the statement of "articulated reasons is the thing out of which law--and particularly judge-made law--grows," an "essential part of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability or the like." 430 F 2d at 972.

A third reason, inherent in the others, is that requiring courts to explain how their conclusions were justified by the application of rules of law, gives assurances to the litigants, the bar, and the public at large, that the determination is not arbitrary, and that all litigants are being equally treated. This fiat by rule of law requirement, is the essence of our judi-

cial system and its acceptance as a vital part of our democratic system of government.

In Frazier v Heebe, ____ US _____, 107 S ct 2607, 47 CCH S Ct Bull B 3653, (1987) the majority of this court held that the Supreme Court may exercise its inherent supervisory power to ensure that local court rules are consistent with "the principles of right and justice." By exercising its supervisory authority the court nullified a local rule of a Louisiana district court concerning the admission of lawyers to practice before it, on the ground that it discriminated against members of the Louisiana bar. Although the court minority disagreed with the majority's conclusion that this court's supervisory authority gave it the right to review local court rules that regulate admission to practice before that court, the

minority did agree that the Supreme Court has supervisory powers and authority to nullify court rules which are constitutionally infirm or which conflict with rules of procedure promulgated by the Supreme Court (107 S Ct at 2616). This includes the situation where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision. Sup Ct Rules 17 1 (a).

In the case at bar, the Third Circuit applied its IOP and used a judgment order, as a means of avoiding the need to explain by what rule of law it and the district court were justified in departing from the principles enunciated in similar cases by this court, the Third Circuit and other circuit courts, and by

what principles of law the Third Circuit and district court were justified in reaching the conclusion that the petitioners were not denied constitutional due process: when, in the face of CPLR Rule 23.1 and constitutional due process, they were denied an evidentiary hearing and cross examination in a case replete with genuine issues of fact; and when the district court failed to make findings of fact and conclusions of law as required by Rule 52 (e); and when the Third Circuit and district court disregarded the decisions of this court and the Third Circuit in similar cases; and when the Third Circuit failed to write an opinion showing the relationship to their determinations of the various important legal issues involved.

By using the methodology of a judgment order to avoid explaining the reasons for its determination, the Third

Circuit made the kind of wrong, unwise and inappropriate application of the Third Circuit's IOP which the Fifth Circuit in NLRB cautioned the courts must guard against if the rule of law is to be safeguarded and the purposes for fashioning methods to enable the courts to stay abreast of the increase in business, are to be constitutionally upheld. The essence of what the Fifth Circuit was saying, which was cited with approval by the Third Circuit in US v Baynes, supra, is that the judgment order means of doing justice must not be used by the courts to conceal and justify injustice, departure from the rule of law, and denial of due process and equal protection of the laws.

As stated by Justice Douglas in Joint Anti Fascist Refugee Committee v McGrath, 341 US 123 at 179 (concurring opinion):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

If the Third Circuit judgment order determination is permissible pursuant to the Third Circuit's IOP, then the IOP should be nullified by this court's exercise of its supervisory powers, because it violates the due process clause of the fifth amendment, the equal protection component of the due process clause of the fifth amendment, and the first amendment freedom of speech and press right of access to civil proceedings. See Publicker Industries Inc. v. Cohen, 733 F 2d 1059 (3rd Cir., 1984). See also Greenholt v Nebraska, 442 US 1 at 40 (Marshall, J, dissenting opinion):

> And the obligation to justify a decision publicly would provide the assurance, critical to the appearance of fairness, that the Board's decision is not capricious.

It would also be violative of 28 US Sec 2071, the congressional enabling statute.

If, however, the Third Circuit misapplied its IOP, then this court should exercise its supervisory powers to grant certiorari and nullify this misapplication, which condones violations of petitioners' constitutional rights, which permits arbitrary determinations without applying the rule of law, and which conflicts with the decisions of this court and the Third Circuit in similar matters.(4)

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(4) In Taylor v McKeithen, 407 US 191 (1972), where the district court had made findings of fact and written an opinion, the Supreme Court majority in note 4 at 194 states its agreement

The argument may be advanced by the respondents, that the questions presented are now moot. This argument is predi-

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that courts of appeals, in most situations should have wide latitude on the determination of whether and how to write opinions. Yet it granted certiorari, vacated the judgment, and remanded the case to the circuit court because that court had reversed the district court's findings by only a short opinion and order. The minority of the court stated at 195-196 that in determining whether circuit action by a short opinion and order, as was done in Taylor, or by no opinion at all is permissible, consideration must be given to the need of the circuit courts to deal with the explosive increase in judicial business, citing NLRB v Amalgamated Clothing discussed on pages 43 to 45 of this petition. Thus, both the majority and minority of the court agree that there are limits to the latitude on decisions of courts of appeals as to whether or how to write opinions. The majority seems to suggest that a circuit court does not fulfill its judicial obligations when it decides by a short opinion and order, even though the district court has made findings and written an opinion, where the actual grounds of the circuit court's determination are not clear. By citing NLRB, the minority seem to suggest that the right of the circuit court to decide by a short opinion or no opinion is circumvented by the parameters and precautions set forth in the Fifth Circuit's opinion. In the case at bar it is clear that neither the district court nor the circuit court fulfilled their judicial responsibility of giving some explanation of the basis for their determinations. There were no findings, no opinions, no explanations of any kind. The egregious nature of the

cated upon the fact that during the pendency of the appeal, respondent Triangle engaged in voluntary acts in disregard of the appeal, and is untenable for the following reasons: the well accepted rule of the Third Circuit and all other courts is that an appeal cannot be mooted by the voluntary acts of a party in disregard of the appeal. Greenfield v Villager Industries, 483 F 2d 824 (3d Cir. 1973); (b) The settlement agreement in the case at bar provided for finality only after the determination of all appeals, and the claim of mootness is in direct contravention of the settlement agreement. Greenfield, 483 F 2d at 834.

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determinations is shown by the fact that the settlement could not have been appropriately approved unless they first balanced the various factors required by the Third Circuit in Girsh discussed on pp. 20, 21, 29-30 of this petition. Neither court did any of this, and it is impossible from the record, to ascertain how they reached their determinations according to law.

(c) The main part of the settlement, the exchange of securities, took place on December 25, 1985, two months before the notice to stockholders was sent and four months before the settlement was presented to the district court for approval; (d) This transaction can easily be undone by the court; (e) The payoff of the note had nothing to do with the settlement, and the appeal does not seek to undo that transaction; (f) Neither the interests of the investing public nor of the minority stockholders of CJI are involved in any mootness question, because the stockholders were specifically notified that they were not being asked to vote on the public offering which resulted in the floating of the junk bonds, and the investing public were put on notice of the pending appeal and the plan to use part of the proceeds of the offering to pay off the note; (g) The stock-

holders of CJI were not called upon to vote on the exchange of securities by Triangle during the pendency of the appeal, and this is a transaction which can easily be reversed since it involves only CJI and its controlling stockholder Triangle; (h) The present state of reincorporation of CJI is not involved in this appeal.

None of the occurrences on which the appellees might rely as the basis for their claim of mootness of the appeal, prevents this court from granting meaningful relief to the respondents, and from causing the undoing of Triangle's acts in disregard of the pending appeal.

Apart from all else, there is no way that the judicial abandonment of the rule of law, and the violations of petitioner's constitutional rights in this case, can be mooted. Nor is there any way

that the importance of this case to the public, can be mooted. The issues in this case involve the acceptance of our judicial system as a vital part of our democratic system.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Norman Annenberg
Attorney for Petitioner
130 West 57th Street, 2A
New York, NY 10019
(212) 245-7575

Dated: New York, NY
August 25, 1987

APPENDIX

APPENDIX

Judgment Order of the US Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 86-5505

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc.

v

Triangle Industries, Inc., and Central Jersey Industries, Inc.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Geeta Shah, Jane M. Stoll, Carl Weber, Objectors,

Appellants

On Appeal from the United States District Court for the District of New Jersey
Civil No. 85-3103
(Honorable Herbert J. Stern)

Argued May 20, 1987

Before: SLOVITER, BECKER, and GARTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

[s/E.R. Becker]
Circuit Judge

ATTEST:

[s/Sally Mrvos]
Sally Mrvos, Clerk

DATED: MAY 27, 1987

JUDGMENT ORDER OF THE U.S.

COURT OF APPEALS FOR THE

THIRD CIRCUIT ON PETITION

FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5505

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc.

v.

Triangle Industries, Inc., and Central Jersey Industries, Inc.

Dale Abrahams, Daniel Bruno, Marcene E. Edelman, Abraham Genderson, Ginny M. Grunley, John M. Hart, Joann M. Holmes, Philip Pfatt, Jr., Libby B. Pohoryles, Sharon H. Pohoryles, Larry D. Rollins, Rochelle Poulos, Norman Schaechter, Mahendra Shah, Edward S. Stoll, Linda W. Swan, Gary Abrahams, Lewis B. Coggan, Stephen L. Edelman, Charlotte Genderson, Kenneth M. Grunley, A. Stewart Holmes, Stephen G. Parker, Louis Pohoryles, Steven E. Pohoryles, James A. Poulos, Mona Schaechter, Getta Shah, Edward S. Stoll, Jane M. Stoll, Carl Weber, Objectors,

Appellants

(Civil No. 85-3103)

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

PRESENT: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and GARTH,*
Circuit Judges.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* Judge Garth as to panel rehearing only.

BY THE COURT,

[s/E.R. Becker]
Circuit Judge

DATED: June 24, 1987

ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LOUIS SHULMAN, derivatively on behalf of Central Jersey Industries, Inc., Plaintiff.	:	Civil Action No. 85-3103
v.		
TRIANGLE INDUSTRIES, INC., Defendant,	:	ORDER
and	:	and
CENTRAL JERSEY INDUSTRIES, INC.; Nominal Defendant.	:	JUDGMENT

This cause came on to be heard on plaintiff's motion for an order and judgment (i) approving the Settlement Agreement, and (ii) dismissing this action on the merits with prejudice and without costs, notice of said motion having been given, as directed by the Court, to the shareholders of Central Jersey Industries, Inc., the nominal defendant corporation on whose behalf these derivative actions were commenced; and the submissions of objecting shareholders having been considered; and the Court having granted such motion,

It is on this 3rd day of June, 1986,

ORDERED, ADJUDGED and DECREED that:

1. The Settlement Agreement herein is approved as fair, reasonable and adequate and the parties are authorized and directed to consummate the settlement and compromise of this action in accordance with the terms of said Settlement Agreement, except as to Paragraph 6(a).

2. The Court's copy of the Settlement Agreement shall be filed with the Clerk of the Court concurrently with this Order and Judgment.

3. All shareholders of Central Jersey Industries, Inc. ("CJI") are forever and permanently barred and enjoined from asserting, on behalf of themselves, or any class of CJI shareholders or derivatively on behalf of CJI, any claim or cause of action, against the defendant Triangle Industries, Inc. or its officers

or directors, which is embraced within the scope of the complaint herein, or which might have been alleged by reason of any matter or transaction referred to in the complaints herein, or arising out of or under the facts and circumstances set forth therein, or relating to any matter or transaction involved in the settlement and compromise of this action.

4. This action is dismissed on the merits with prejudice.

5. Plaintiff's reasonable attorney's fees and litigation disbursements are allowed for work performed up to and including April 28, 1986, without prejudice to an application for work performed subsequent to that date, in the amounts of $24,460.20 in disbursements, to be paid by Central Jersey Industries, Inc. within 30 days of the date of this Order; and attorney's fees of $84,855.00,

$34,855.00 of which is to be paid by Central Jersey Industries, Inc., within 30 days of the date of this Order, and the remainder to be paid by Triangle Industries, Inc. within one year of the date of this Order.

(s/Herbert J. Stern)
HERBERT J. STERN
United States District Judge